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Attorneys for Defendant
JANI-KING OF SEATTLE, INC

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AUSTIN L. OKOCHA,

Plaintiff,

v

JANI-KING, INC., and JANI-KING OF SEATTLE,

Defendants

CASE NO C01-1688

MOTION BY JANI-KING OF SEATTLE, INC. TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 11, 2002
(No oral argument requested)

[Fed R. Civ. Proc. 12(b)(2)]

[Declaration of Donald A. Burleson Submitted Concurrently Herewith]

TO THE PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 11, 2002, or as soon thereafter as the matter may be heard without oral argument, in the United States District Court, Western District of Washington, defendant Jani-King of Seattle, Inc will and hereby does move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)

Jani-King of Seattle, Inc , a dissolved Texas corporation, moves to dismiss the Complaint against it on the following grounds

Count 1: Breach of Contract

The Plaintiff has attached a copy of the breached contract to his Complaint as Exhibit A On its face, that document shows that this moving defendant was not a party to the contract

Count 2: Breach of Implied Covenant

Because Jani-King of Seattle, Inc is not a party to the Agreement and there is no allegation of any other contractual relationship between it and the Plaintiff, no implied contract rights exist between the parties

Count 3: Intentional Interference with Business Relationship

The Plaintiff complains that the "defendant's" assignment of the Allied contract to the Plaintiff was interfered with, leading to the re-assignment of the contract to another franchisee. One party to a contract cannot be sued for interference with its own contract

Count 4: Deceit, Fraud, and Misrepresentation

The Plaintiff fails to state the elements of a cause of action for fraud. The alleged representation that things would be worked out was not a representation of an existing fact The Plaintiff's injuries were not proximately caused by the representations allegedly made to him The damages suffered by the Plaintiff, if any, came because the agreement to assign the Allied contract was breached Statements about why the contract was transferred or suggesting that the Plaintiff should go home did not proximately cause him any injuries. Further, the Plaintiff's vague allegations do not meet the requirements of Rule 9

Count 5: Defamation

The allegedly defamatory communication was neither false nor unprivileged. The report to a policeman following an admitted physical interchange was privileged and should be subject to challenge only if the elements of a false arrest can be stated. The statute of limitations has run on the claim, regardless of how it is labeled

Count 6: Disparate Treatment

The Plaintiff alleges that a contract was re-assigned to another franchisee, making good a

threat that had been made after a physical altercation. The Plaintiff fails to allege that the other franchisee was similarly situated at the time of the transfer

Count 7: Retaliation

The Plaintiff is not alleged to have been an employee of the moving party and no cause of action is available to him Further, alleged retaliation following an altercation implicates no clear public policy

Count 8: Intentional Infliction of Emotional Distress

The conduct alleged is not sufficiently outrageous to support a cause of action for intentional infliction of emotional distress

Although this moving party is not a party to the Franchise Agreement, because the Complaint alleges that it is, in fact, a party to the contract, Jani-King of Seattle, Inc prays for an award of attorneys' fees under the Franchise Agreement

This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities and the Request for Judicial Notice submitted concurrently herewith, and all pleadings and papers on file in this action and such other matters and argument as may be adduced upon hearing.

DATED December 17, 2001

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Memorandum of Points and Authorities

I. Prefatory Statement

Jani-King of Seattle, Inc is a Texas corporation incorporated on August 2, 2000 and dissolved on November 21, 2001 *See* Request for Judicial Notice, exhibits "A" and "B " It is readily apparent that Jani-King of Seattle, Inc was not in existence when the Franchise Agreement was signed on December 3, 1993, nor was it in existence on July 14, 1999, the evening when the events occurred giving rise to the Plaintiff's Complaint. From a practical standpoint, it would have been impossible for Jani-King of Seattle, Inc., a Texas corporation, to have had the Plaintiff arrested or to have transferred a contract, whether for discriminatory reasons or not, at a time before the corporate entity had been formed. If judicial notice is taken of the objective true facts, the entire Complaint becomes absurd as to this defendant.

Further, nowhere in the Complaint does the Plaintiff request any specific relief against Jani-King of Seattle, Inc. The caption of the Complaint states the Defendants as "Jani-King, Inc , and or Jani-King of Seattle " For the reasons stated, Jani-King of Seattle, Inc. prays that it be dismissed from this suit

II. Standard for Motion to Dismiss

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacific Police Dept.*, 901 F.2d 696, 799 (9th Cir. 1990) "The court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir 1994).

The Plaintiff's Complaint is not supportable under any cognizable legal theory and should be dismissed in its entirety

III. First Count: Breach of Contract

The Plaintiff alleges that he entered into a franchise agreement with "Defendant"–neither named defendant is specified–on December 30, 1993 [Plaintiff's Complaint, ¶ 3] to "operate a business as a franchise of Jani-King, Inc " [*Id.*, ¶ 8]

The document the plaintiff attaches to his Complaint undermines his own claims. The first sentence of the Agreement, Exhibit A to the Complaint, states that it is "by and between" Austin L Okocha, the Plaintiff here, and "ROBERT H VENNELL CO , INC d/b/a JANI-KING OF SEATTLE, a Washington Corporation, hereinafter referred [to] as Franchisor" [hereinafter referred to as "Vennell"] The Agreement provides that the Franchisor's home office is "in Mill Creek, Snohomish County, Washington " The Agreement is signed by Vennell and the Plaintiff only The Agreement is not an agreement with Jani-King of Seattle, Inc , a Texas corporation, but states on its face that it is an agreement with Vennell, a Washington corporation Nor is Jani-King, Inc a party to the Agreement

The Plaintiff claims he has suffered damages, including mental anguish [¶ 37], because "defendant"–again, no specific defendant is noted–has "failed, neglected and omitted to comply, abide and in effect perform its own obligation under the agreement " [¶ 35]

Simply stated, defendant Jani-King of Seattle, Inc , a Texas corporation, is not a party to the Agreement attached to the Complaint and, therefore, could not have failed to abide by any obligations placed upon it by the Agreement Accordingly, Jani-King of Seattle, Inc., a Texas corporation, did not breach any agreement with the Plaintiff and this count should be dismissed against it

IV. Count 2: Breach of Implied Duty of Good Faith

The second count claims a duty "to abide by the terms of the agreement and to protect the existence of the agreement " [¶ 40] Whatever the extent of the duty of contracting parties to one another, there is no implied duty on the part of a stranger to a contract to abide by its terms or to protect its existence Because Jani-King of Seattle, Inc., a Texas corporation, is not a party to the Agreement, it has no implied duty of good faith to the Plaintiff, and should be dismissed from this count as well

V. Count 3: Interference with Business Relationship

The third count alleges that on July 13, 1999, certain individuals intentionally approached the plaintiff's employees and offered them more money It does not allege, however, that any employee actually accepted the alleged offer It also asserts that the "defendant"–again, no

specific defendant is alleged--"contracted with Allied to provide janitorial services in its building" and then "assigned the said account to plaintiff based on the franchise agreement." [¶ 54] The Plaintiff was then allegedly removed from the Allied account on July 14, 1999 [*Id.*]

The elements of tortious interference with business relationship are (1) a valid contractual relationship or business expectancy; (2) knowledge thereof; (3) intentional interference inducing or causing a breach; and (4) resultant damage. *Island Air, Inc. v LaBar*, 18 Wash App. 129, 566 P 2d 972 (1977). One party to a contract cannot be liable for the tort of interference with contract for inducing a breach by himself or the other contracting party *Houser v. City of Redmond*, 91 Wash 2d 36, 39, 586 P 2d 482, 484 (1977)

The Plaintiff complains that the Allied contract was first assigned to him "based on the franchise agreement," but then re-assigned to someone else. At most, this would establish a breach of a contract, not a tort Under the Franchise Agreement, the assignment and re-assignment of cleaning accounts is addressed in considerable detail (*See* Exhibit "A," ¶ 4.6, to the Complaint). Because the transfer of accounts is expressly alleged to be governed by the Franchise Agreement, and that document does reflect an express agreement as to the conditions necessary for a re-assignment of accounts, the re-assignment of accounts necessarily raises a contract issue, and not a tort claim

VI. Count 4: Deceit

The elements of a civil fraud claim are: "(1) representation of an existing fact, (2) materiality; (3) falsity, (4) speaker's knowledge of its falsity; (5) speaker's intention that it shall be acted upon by the plaintiff; (6) plaintiff's ignorance of falsity, (7) reliance, (8) right to rely, and (9) damages." *Patterson v. Taylor*, 93 Wash App 579, 586, 969 P.2d 1106 (1999)

Count four alleges that unnamed agents of the defendants failed to advise the Plaintiff of a visit by a company employee, in violation of company policies It is further alleged that the Plaintiff was told that Allied had asked to have him terminated for non-performance and that he should go home because the Defendant's agents were going to resolve the situation amicably [Complaint, ¶ 64] The Defendant's true intent was purportedly "cancelled" from the plaintiff (presumably, concealed), vexing, annoying and injuring the Plaintiff [*Id.*, ¶ 66]

This does not state a cause of action for fraud The failure to give advanced warning of a site visit and the statement that things would be worked out in the future were not representations of existing facts Nor could the plaintiff have reasonably relied upon any of these statements or proximately suffered damages as a consequence of doing so The key issue, apparently, is that a client, Allied, canceled the contract the defendants had allegedly assigned to the Plaintiff In reliance upon the representations made to him about why the contract had been terminated, the Plaintiff claims only that he was induced to go home [*Id.*, ¶ 65]

The alleged representations were not material and could not have proximately caused damages to the Plaintiff. Whether the Plaintiff went home or not on July 13, 1999, the contract with Allied had still been terminated. The Plaintiff makes no allegation that his continued presence at the job site on that date would have had any impact upon the retention of the Allied contract

What the Plaintiff complains of is no more than the breach of an alleged contract to assign the Allied contract. *See American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash 2d 217, 230, 797 P.2d 477 (1990) ("Generally, a breach of contract does not give rise to an action in tort") Any injury to the Plaintiff would have been proximately caused by the breach of the Allied contract, not by comments made about why the contract had been terminated or predicted that things would be worked out amicably If things were not worked out amicably, the Plaintiff's damages would be the same breach of contract damages If claims like the Plaintiff's were sufficient to support fraud claims, every disagreement about why a contract had been terminated would automatically expand into a fraud claim

Further, Rule 9 of the Federal Rules of Civil Procedure requires that claims of fraud be pled with specificity The averments must at least identify (1) the maker of the misrepresentation, (2) the time and place of the misrepresentation, (3) the content of each misrepresentation, and (4) the role of each defendant in the scheme *Wanetick v. Mel's of Modesto*, Inc., 811 F Supp 1402 (N D Cal. 1992)

The claimed representations were made by "defendants' agents," who remain unnamed [Complaint, ¶ 62] Because no individual is named, there is no allegation about the role of each

individual in the scheme This is especially significant in the instant case, where it is apparent that the alleged act of fraud predates the formation of this moving corporate defendant More specific allegations following the dictates of Rule 9 would establish that the complained of representations could not have been made by agents or employees of this moving defendant

VII. Count 5: Defamation

In Count 5, the Plaintiff attempts to state a cause of action for false arrest, improperly labeled as a claim for defamation The arrest and allegedly defamatory report occurred on July 13, 1999, more than two years before this suit was filed The two year statute for both defamation and false arrest has, therefore, already run *See* RCW 4 16 100. *See also Eckert v. City of Yakima*, 42 Wash.App. 38, 708 P.2d 407 (1985).

"A prima facie defamation case requires a showing (1) that the defendant's statement was false, (2) that it was unprivileged, (3) fault, and (4) that the statement proximately caused damage." *Wood v. Battle Ground School District*, 107 Wash.App 550, 567, 27 P 3d 1208 (2001) Here, the Plaintiff cannot prove that statements made to an arresting officer after an admitted physical scuffle were false or unprivileged

According to the Plaintiff, on July 13, 1999, he had a physical confrontation with one Jefferey Polzer, falsely alleged to be the employee of Jani-King, Inc. (and, accordingly, for purposes of this motion, assumed to be a Jani-King, Inc employee) The Plaintiff admits that the parties exchanged a "few furious words" and that he "equally grabbed polzers shirt" (sic) [Complaint, ¶ 71] Polzer allegedly then called the police and reported to them that the Plaintiff had become violent [*Id.*, ¶ 72], an allegation that is not inconsistent with the Plaintiff's own pleading admission that he had grabbed Polzer's shirt The citation from the Redmond police for assault and harassment [¶ 74] would have been appropriate based on the conduct acknowledged by the Plaintiff in his pleading, in and of itself Even if the Plaintiff had a good reason to grab Polzer by the shirt, there was no falsity in reporting to the police that the assault had occurred

The Plaintiff alleges that false information was provided to State Prosecutors and that the defendants "falsely imputed plaintiff's reputation" (sic) [¶ 79] Generally, a statement made in the public interest to a public officer is privileged *Kauzlarich v Yarborough*, 105 Wash App.

632, 20 P 3d 946 (2001) The officer must be authorized to act on the information reported *Jolly v. Valley Publ'g Co.*, 63 Wash 2d 537, 541, 388 P 2d 139 (1964) A report to the Redmond police following a physical scuffle of the kind admitted in the Plaintiff's complaint would meet these criteria The report to the police was, therefore, not unprivileged, and does not meet the requirements for a defamation claim.

Moreover, there are also public policy reasons why a false arrest claim should not be re-constituted in the form of a defamation claim Probable cause is an absolute defense to false arrest *Hanson v. City of Snohomish*, 121 Wash 2d 552, 563, 852 P 2d 295 (1993) It is not hard to imagine circumstances where a party would have probable cause for an arrest (e g., following a physical assault), but where every word reported to the police was not demonstrably true. Further, while defamation may be based upon mere negligence as to falsity, negligence is insufficient to defeat a privilege. *See Moore v. Smith*, 89 Wash.2d 932, 938, fn. 1, 578 P 2d 26 (Wash 1978). Thus, a negligent report to an arresting officer would not be actionable under the law specifically developed to address false arrests.

It would subvert the public policy of allowing victims of crimes to report crimes with impunity where there is probable cause, if police reports were held to the stricter standard of a defamation claim. The Plaintiff's claim should have been stated as a false arrest claim In any event, whether stated as a claim for false arrest or defamation, the statute of limitations has run

VIII. Count 6: "Disparate Treatment"

The fifth count alleges that the Plaintiff is a member of an unnamed protected class [¶ 83], that the Allied account that the "defendant" had assigned to the Plaintiff [¶ 54] was re-assigned to a white franchisee [¶ 86] and that Polzer's false allegation of assault was a mere pretext to an intent to transfer the account to the white franchisee [¶ 87] Notably, these allegations are at odds with the incorporated [¶ 81] allegation that directly after the Plaintiff and Polzer had grabbed each other and exchanged furious words [¶¶18, 71], Polzer then threatened to ruin the Plaintiff financially, specifically threatening that he would take away the Allied contract [¶ 19]

To state a discrimination claim, a plaintiff must show disparate treatment or disparate impact. *Hume v American Disposal Co.*, 124 Wash.2d 656, 668, 880 P 2d 988, 995(1994) The

plaintiff must demonstrate that preferential treatment was given to a "similarly situated, non-protected" person *Washington v Boeing Co*, 105 Wash App 1, 14, 19 P 3d 1041 (2000)

First, the Plaintiff asserts that he had a dispute with Polzer about the proper interpretations of company policies and procedures [Complaint, ¶ 14] After each of the parties had grabbed the other and "furious words" had been exchanged, Polzer had the Plaintiff arrested Given the admitted circumstances preceding the re-assignment of the Allied account, the Plaintiff fails to allege that the white franchise to whom the Allied account was transferred was "similarly situated" Nor is it likely that the Plaintiff could allege that the white franchisee had also engaged in a physical and verbal altercation with Polzer and been arrested at his behest

Notably, the initial assault is not framed in racial terms, but arises out of a dispute over Polzer's right to monitor the Plaintiff's ongoing cleaning work under company policies and procedures [¶¶ 13- 20] Regardless of who is right about the assault, it is apparent that the Plaintiff's circumstances are necessarily unique and that no other franchisee was "similarly situated"

IX. Count 7: Retaliation

The seventh count alleges that "the Defendant discontinued franchise relationship with Plaintiff" (*sic*) [Complaint, ¶ 90], that the "defendant's agent falsely accused Plaintiff of assault and harassment" [Id]; and complains of "wrongful termination" [¶ 93] and the loss of "the right to engage in gainful employment" [¶ 94]

Under the Franchise Agreement attached to the Complaint as Exhibit "A," Jani-King of Seattle, Inc was not the franchisor and, thus, was in no position to discontinue a franchise relationship with the Plaintiff. The right to file a retaliation suit is quite limited–"an employee will have 'a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy '" *Dicomes v. State*, 113 Wash 2d 612, 617, 782 P 2d 1002 (1989), *emphasis added See also* R C W 51 48 025

The Plaintiff expressly acknowledged in his Franchise Agreement that he was not Vennell's employee [Ex "A" ¶ 11 7], the Complaint does not allege that the Plaintiff was ever employed by Jani-King of Seattle, Inc. In the absence of an employment relationship with this

defendant, the Plaintiff has no right to sue for wrongful termination.

Further, there must be a "clear public policy" violated by the defendant's conduct *Ellis v City of Seattle*, 142 Wash 2d 450, 459, 13 P 3d 1065 (2000) The existence of a clear public policy "is a question of law" *Roberts v Dudley*, 140 Wash 2d 58, 64, 993 P.2d 901 (2000) It must be shown that an "employer's conduct contravened 'the letter or purpose of a constitutional, statutory, or regulatory provision or scheme'" *Ellis v. City of Seattle*, 142 Wash 2d 450, 459, 13 P 3d 1065 (2000)

The Plaintiff appears to claim that he was retaliated against because of his physical altercation with Polzer. The only clear public policy implicated is the policy against false arrest, protected by a cause of action the Plaintiff did not file in a timely manner. No other clear public policy is implicated

X. Count 8: Intentional Infliction of Emotional Distress

Conduct is outrageous if "the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'" *Contreras v. Crown Zellerbach Corp.*, 88 Wash 2d 735, 740, 565 P 2d 1173 (1977) The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" *Grimsby v Samson*, 85 Wash 2d 52, 59, 530 P 2d 291 (1975) The court must initially determine if reasonable minds could differ on whether the conduct was sufficiently extreme to justify liability. *Phillips v. Hardwick*, 29 Wash App. 382, 387, 628 P.2d 506 (1981)

Liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" *Grimsby, supra*, 85 Wash 2d 52, 59 *See also Hope v Larry's Market*, 108 Wash.App.185, 29 P 3d 1268 (2001) (employee's continued exposure to harsh chemical cleaners despite prior complaints held not outrageous); *Brown v. Columbia Basin Community College*, 2001 WL 518329 (Wash App 2001) (instructor inviting student to "knife her" and guaranteeing that student would not graduate held not outrageous), *Robel v Roundup Corporation*, 103 Wash App 75, 10 P.3d 1104 (2000) (coworkers' alleged descriptions of employee as "snitch," "squealer," "liar," and "idiot" held not outrageous), *Washington v. Boeing*

Co., 105 Wash App 1, 53, 19 P 3d 1041 (2000) (race discrimination not sufficiently outrageous)

Count 8 merely incorporates by reference the preceding allegations of the Complaint and alleges that the alleged conduct was "outrageous and intolerable " [Complaint, ¶ 96] These allegations include a false arrest, which is no longer legally actionable, statements made to an arresting officer after an admitted physical altercation, an offer of employment to the Plaintiff's employees that was never accepted and the cancellation of a contract that Vennell had assigned to the Plaintiff This is insufficient to support an action for intentional infliction of emotional distress

XI. Conclusion

In the first place, the Plaintiff is prosecuting a case against the wrong defendant. He signed a contract with Vennell's Washington corporation, but for some reason has filed suit against two other entities instead His complaint is premised on events that occurred on July 13 and 14 of 1999, events that occurred before this moving defendant had even been formed His complaint often refers to a single, unnamed, defendant, further evidencing his confusion Simply stated, it appears from the Agreement the Plaintiff has attached to his complaint that any claims he might have should be stated against Vennell.

The Complaint includes no allegation explaining how Jani-King of Seattle, Inc might be liable for events taking place before its corporate formation The Plaintiff and his counsel have an obligation to conduct due diligence into the facts giving rise to claims before filing a pleading or amended pleading No viable cause of action has been stated against Jani King of Seattle, Inc

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Accordingly, the Complaint against it should be dismissed and costs and attorneys' fees should be awarded to the moving party

DATED December 17, 2001

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AUSTIN L OKOCHA,

Plaintiff,

v.

JANI-KING, INC , and JANI-KING OF SEATTLE,

Defendants

CASE NO · C01-1688

[PROPOSED] ORDER GRANTING JANI-KING OF SEATTLE, INC.'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On January _____, 2002, there came on for hearing the motion of Defendant Jani-King of Seattle, Inc , a Texas corporation, to dismiss the Complaint herein pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) before the Honorable Thomas S. Zilly Plaintiff was represented by Austin Agomuoh Jani-King of Seattle, Inc was represented by Jonathan C. Solish

The Court, having reviewed the pleadings submitted by the parties, and having heard oral argument from counsel,

HEREBY ORDERS as follows

1 The motion is GRANTED with respect to all causes of action, and

2 Jani-King of Seattle, Inc is dismissed from the lawsuit

IT IS SO ORDERED

Dated this _____ day of January, 2002

The Honorable Thomas J Zilly
United States District Judge

Respectfully submitted

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